

A **Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum
Far East Ltd & Ors; (Uma Devi d/o R Balakrishnan,
third party)**

HIGH COURT MALAYA (KUALA LUMPUR) — CIVIL SUIT NO D3-22-
1707 OF 2002

B ZULKEFLI J
30 JULY 2003

C *Legal Profession* — Counsel acting for both plaintiffs and third party — Whether exists
conflict of interest — Whether erection of ‘Chinese Wall’ possible — Whether counsel should
be disqualified — *Legal Profession (Practice and Etiquette) Rules 1978 r 5(a) (b)* — *Rules
of the High Court 1980 O 16*

D This was an application by way of notice of motion on the part of the
third, fourth and fifth defendants (‘the defendants’) to disqualify
Messrs Sri Dev & Naila (‘the solicitors’) from representing the third
party in this action. Mr Sri Dev Nair (‘counsel’) of Messrs Sri Dev
Naila acts as counsel for the plaintiffs in the present suit as well in
another related case (‘the other suit’) involving parties that are almost
the same in the present suit. The third party in this suit, one Uma
Devi, being a director of the second defendant in the present suit had
E affirmed an affidavit on behalf of the second defendant’s application
for an injunction against the plaintiffs in the other suit whilst in the
present suit she has in support of the application for an interim
injunction alleged that the second defendant’s application for an
injunction in the other suit was ‘spurious’ despite having affirmed the
F affidavit supporting the second defendant’s application. It is the
contention of the defendant therefore that the solicitors cannot act for
the third party in the present suit when counsel is also acting for the
plaintiffs in the other suit. It is also the contention of the defendants
that the solicitors cannot act for the third party in the present suit
knowing that the third party has given conflicting evidence on oath in
this as well as in the other suit.

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Held, dismissing the defendants’ application with costs:

H (1) Order 16 r 4(4) of the Rules of High Court 1980 (‘the RHC’) allows the court to give such directions to the third party to defend the suit whether alone or jointly with any defendant. The necessary consequence of O 16 r 4(4) of the RHC is that the third party can, at the trial, cross-examine the plaintiffs and seek discovery against and interrogate the plaintiffs. In essence, the plaintiffs and the third party are on ‘opposing’ sides much the same way as the plaintiffs and the defendants are on opposing sides. The position that the plaintiffs and the third party are on ‘opposing’ sides, so to speak, is further evidenced by the fact that the third party notice issued in this case is in accordance with
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- Form 22 of the RHC which states that the third party is allowed to dispute the plaintiffs' claim against the defendant; or dispute the defendants' claim against the third party (see p 707D–G). **A**
- (2) Counsel acts for the third party whilst continuing to act for the plaintiffs in the other suit. As these suits are related, there can be no doubt that counsel whilst acting for both the plaintiffs and the third party will come into confidential information (see p 708H–709A). **B**
- (3) Furthermore counsel has not shown in anyway how he intends to avoid the obvious conflict and since he acts personally in both suits, he cannot possibly erect a 'Chinese Wall' between the information obtained from the plaintiffs in the other suit and the information obtained from the third party in the present suit (see p 709B–C). **C**
- (4) Rule 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978 prohibits an advocate and solicitor from accepting a brief if it would be difficult for him to maintain his professional independence (see p 711F–G). **D**
- (5) There would therefore be no prejudice to the third party in the event counsel and his firm are disqualified from representing her as she would be at liberty to retain other solicitors. Conversely, to allow counsel to continue to act for the third party would raise serious questions relating to a breach of confidence, conflict of interest and ultimately the due administration of justice (see p 711H–I). **E**

[Bahasa Malaysia summary]

Ini merupakan satu permohonan melalui notis usul defendan ketiga, keempat dan kelima ('defendan-defendan') untuk tidak melayakkan Tetuan Sri Dev & Naila ('peguam-peguam') daripada mewakili pihak ketiga dalam tindakan ini. Encik Sri Dev Nair ('peguam') dari Tetuan Sri Dev & Naila bertindak sebagai peguam bagi plaintiff-plaintif dalam guaman ini dan juga satu kes lain yang berkaitan ('guaman yang lagi satu') yang melibatkan pihak-pihak yang lebih kurang sama dengan plaintiff dalam guaman ini. Pihak ketiga dalam guaman ini, Uma Devi, sebagai pengarah defendan kedua dalam guaman ini telah mengesahkan satu affidavit bagi pihak permohonan defendan kedua untuk injunksi menentang plaintiff-plaintif dalam guaman yang lagi satu sementara dalam guaman ini, beliau demi menyokong permohonan untuk injunksi interim mengatakan bahawa permohonan defendan kedua untuk satu injunksi dalam guaman yang lagi satu itu bersifat palsu walaupun beliau telah mengesahkan affidavit menyokong permohonan defendan kedua. Ia dipertikaikan oleh defendan-defendan bahawa peguam-peguam tidak boleh bertindak bagi pihak ketiga dalam guaman ini apabila peguam juga bertindak untuk plaintiff-plaintif dalam guaman yang lagi satu. Ia juga dipertikaikan oleh defendan-defendan bahawa peguam-peguam tidak **F**

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- A** boleh bertindak untuk pihak ketiga dalam guaman ini kerana pihak ketiga telah memberikan keterangan yang bercanggah di bawah sumpah dalam guaman ini dan guaman yang lagi satu.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

- B** (1) Aturan 16 kaedah 4(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') membenarkan mahkamah memberikan arahan kepada pihak ketiga untuk membela guaman tersebut samada dengan sendiri atau bersama-sama dengan mana-mana defendan. Akibat Arahan 16 kaedah 4(4) KMT 1980 adalah bahawa pihak
- C** ketiga boleh, sewaktu perbicaraan, memeriksa balas plaintif-plaintif dan memohon mendapatkan penzahiran terhadap dan menyoalsiasat plaintif-plaintif. Pada dasarnya, plaintif-plaintif dan pihak ketiga merupakan pihak-pihak yang saling 'menentang' seperti sebagaimana plaintif-plaintif dan defendan-defendan saling menentang. Kedudukan 'bertentangan' tersebut dibuktikan
- D** lagi oleh fakta bahawa notis pihak ketiga yang dikeluarkan dalam kes ini menepati Borang 22 KMT 1980 yang menyatakan bahawa pihak ketiga dibenarkan mempertikaikan tuntutan plaintif-plaintif terhadap defendan; atau mempertikaikan tuntutan defendan-defendan terhadap pihak ketiga (lihat ms 707D–G).
- E** (2) Peguam bertindak bagi pihak ketiga sementara masih bertindak bagi plaintif-plaintif dalam guaman yang lagi satu. Oleh kerana kedua-dua guaman ini berkaitan, ia tidak dapat dinafikan bahawa apabila bertindak untuk kedua-dua plaintif dan pihak ketiga, peguam tersebut akan mendapat maklumat yang sulit (lihat ms 708H–709A).
- F** (3) Lagipun, peguam tidak menunjukkan dalam apa jua cara pun bahawa beliau berniat mengelakkan persengketaan tersebut dan oleh kerana beliau bertindak secara persendirian dalam kedua-dua guaman, beliau tidak mungkin mendirikan suatu 'Dinding Cina' di antara maklumat yang diperolehi daripada plaintif-plaintif dalam guaman yang lagi satu dan maklumat yang diperolehi daripada pihak ketiga dalam guaman ini (lihat ms 709B–C).
- G** (4) Kaedah 5(a) Kaedah-kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 menghalang seseorang peguambela dan peguamcara daripada menerima suatu arahan jika ia sukar bagi beliau untuk mengekalkan kebebasan profesional (lihat ms 711F–G).
- H** (5) Oleh itu, ia tidak akan mendatangkan kemudaratan terhadap pihak ketiga sekiranya peguam dan firma beliau disebabkan tidak layak mewakili pihak ketiga kerana beliau masih bebas untuk mendapatkan perkhidmatan peguamcara lain. Sebaliknya, tindakan membenarkan peguam bertindak bagi pihak ketiga akan
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membangkitkan soalan yang serius mengenai pecah amanah, persengketaan kepentingan dan akhirnya, pentadbiran keadilan (lihat ms 711H-I).] **A**

Cases referred to

- Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509 (refd) **B**
Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222 (refd)
Aw Sing Moey & Ors v Melombong & Perumahan Sdn Bhd [1998] 7 MLJ 239 (refd)
Yong & Co v Wee Hood Teck Development Corporation [1984] 2 MLJ 39 (refd) **C**
Russell MvVeagh McKenzie Bartleet & Co v Tower Corporation [1998] 3 NZLR 641 (refd)
Suchy v Zurich Insurance Co 1998 ACWSJ 662632
Carlingwood Motors Ltd v Nissan Canada Inc [2001] ACWSJ 676321 (refd)
Martin v Gray 77 DLR (4th) 249 (refd) **D**

Legislation referred to

Rules of the High Court 1980 O 16 r 4(4), Form 22,
 Legal Profession (Practice and Etiquette) Rules 1978 r 5, (a), (b) (i) **E**

Harjit Singh (Gill & Tang) for the plaintiff.

Colin Pereira (Zuharina with him) (Goh Wong Pereira) for the applicant/ third, fourth and fifth defendants.

Sri Dev Nair (Sri Dev Naila) for the third party/respondent. **F**

Zulkefli J: This is an application by way of notice of motion on the part of the third, fourth and fifth defendants ('the defendants') to disqualify Messrs Sri Dev & Naila from representing the third party in this action (encl 61). **G**

As regards the court's jurisdiction, I am of the view that this court has an inherent jurisdiction to hear such an application to disqualify a solicitor from acting for a particular party in the interest of justice (see the case of *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509).

The grounds for the application **H**

It is not disputed that Mr Sri Dev Nair of Messrs Sri Dev & Naila acts as counsel for the plaintiffs in the present case for the plaintiffs in another related case in the Kuala Lumpur High Court Suit No D6-22-553 of 2001 involving parties that are almost the same as in the present case. The cause of action of the parties in these two related cases is focused on the issue of a dispute over the rights of ownership of the Hollywood trade mark under a distribution agreement entered into by the parties on 6 July 2000. **I**

- A** It is also not disputed that the third party Uma Devi d/o Balakrishnan whilst being a director of the second defendant in the present suit had affirmed an affidavit on behalf of the second defendant's application for an injunction against the plaintiffs in the said Suit No D6-22-553 of 2001. The third party has, in the present suit in support of the plaintiffs' application for an interim injunction (encl 2) alleged that the second
- B** defendant's application for an injunction in the said Suit No D6-22-553 of 2001 was 'spurious' despite having affirmed the affidavit supporting the second defendant's application.

- It is the contention of the defendants that Messrs Sri Dev & Naila cannot act for the third party when Mr Sri Dev Nair is acting for the
- C** plaintiffs in another related suit ('the first conflict'). It is also the contention of the defendants that Messrs Sri Dev & Naila cannot act for the third party knowing that the third party has given conflicting evidence on oath in this suit and in Suit No D6-22-553 of 2001 ('the second conflict').

D *The first conflict*

- It is my view that in any suit, the plaintiff and third party will be in conflicting positions. Order 16 r 4(4) of the Rules of High Court 1980 ('the RHC') allows the court to give such directions to the third party to defend the suit whether alone or jointly with any defendant. The necessary consequence of
- E** O 16 r 4(4) of the RHC is that the third party can, at the trial, cross-examine the plaintiffs and seek discovery against and interrogate the plaintiffs. In essence, the plaintiffs and the third party are on 'opposing' sides much the same way as the plaintiffs and the defendants are on opposing sides. The position that the plaintiffs and the third party are on 'opposing' sides, so to speak, is further evidenced by the fact that the third party notice (encl 34)
- F** issued in this case is in accordance with Form 22 of the RHC which states that the third party is allowed to dispute the plaintiffs' claim against the defendant; or dispute the defendants' claim against the third party. Having established that the plaintiffs and the third party are on opposing sides, the issue that has to be determined by this court is whether Mr Sri Dev Nair can continue to act for the third party when he also acts as counsel for the
- G** plaintiff, albeit in a different but related Suit No D6-22-553 of 2001.

The second conflict

- H** The third party in the present suit has in a statutory declaration annexed to the affidavit in support of the plaintiffs' application for an interim injunction as in encl 2 stated as follows:

- Angela in the meanwhile had been to see Ms HH Goh & Company, solicitors who commenced KLHC Civil Suit No D6-22-553-2001 on 5 April 2001 against Kayla and Kayla Group and also applied for an ex parte injunction on the same day to restrain from broadcasting the informecials on FTP and GCS II based on all the spurious documents specially made up for Quantum
- I** Malaysia.

However, it is noted that in the said Suit No D6–22–553 of 2001, the third party had affirmed an affidavit supporting the second defendant’s application for an injunction. It is clear that the third party is nothing more than a self serving witness who is prepared to give evidence for whichever party she is employed with. How could Mr Sri Dev Nair represent the third party in this present suit when he acted for the plaintiffs in Suit No D6–22–553 of 2001 in which the plaintiffs resisted an injunction which was supported by the third party’s affidavit, especially that now the third party has chosen to resile from her earlier evidence?

The law

The leading case

The leading authority on conflicts is the decision of the House of Lords in the case of *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222. The relevant facts of the case are as follows:

Prince Jefri was chairman of the Brunei Investment Agency (BIA) and for a period of 18 months had retained (in his personal capacity) KPMG to act for him or one of his companies in private litigation in which he was engaged. Prince Jefri was subsequently dismissed from his position as chairman of BIA and the Government retained KPMG to assist in the investigations into the conduct of the affairs of the BIA whilst Prince Jefri was Chairman. Notwithstanding the fact that KPMG took the view that there was no conflict, the firm erected an information barrier (Chinese Wall) around the department within the firm carrying out the investigation into BIA. The issue raised in the said above mentioned case is whether KPMG could act for the Brunei Government to investigate BIA when it had previously acted for Prince Jefri, notwithstanding that KPMG had ceased acting for Prince Jefri; and the erection of the ‘Chinese Wall’.

The House of Lords held that there was in fact a conflict. Applying the aforesaid principles to the present case, I am of the view there is no doubt that there is a conflict. Here, the situation is even more serious in that there is no question of a ‘Chinese Wall’ as Mr Sri Dev Nair acts personally for the third party in this case and the plaintiffs in suit D6–22–553 of 2001. Further, in the above case, the House of Lords held there to be a conflict notwithstanding that KPMG had already ceased acting for Prince Jefri. Here, Suit No D6–22–553 of 2001 is part heard and is still pending and Mr Sri Dev Nair continues to remain as counsel on record.

The Malaysian position

In the case of *Aw Sing Moey & Ors v Melombong & Perumahan Sdn Bhd* [1998] 7 MLJ 239, the court held that counsel and his firm should be disqualified from acting for the plaintiff in the suit as counsel had advised other parties whilst in his previous firm. Applying the aforesaid principle in this case, again it is apparent that Mr Sri Dev Nair’s conflict is even more

A serious, in that he now acts for the third party whilst continuing to act for the plaintiffs in Suit No D6–22–553 of 2001, and as submitted, these suits are related. There can also be little doubt that Mr Sri Dev Nair whilst acting for both the plaintiffs and the third party will come into confidential information.

B In the Federal Court case of *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, it was held that being a common solicitor for different clients was a conflict and the burden was on the solicitors to show that the conflicting interest did not prevent the solicitors from doing their duty. In applying the aforesaid principle, I find that Mr Sri Dev Nair has not shown in anyway how he intends to avoid the obvious conflict. Further,

C since he acts personally in both suits, he cannot possibly erect a ‘Chinese Wall’ between the information obtained from the plaintiffs in Suit No D6–22–553 of 2001 and information obtained from the third party in the present suit.

D The New Zealand position

In the case of *Russell MvVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, the court in dealing with the issue of conflict of interest and the disclosure of confidential information inter alia had this to say at pp 31–33:

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It is necessary to go back to the basic issue, which is the protection of confidential information from disclosure. In our view this issue should be addressed by the Court applying a principled approach, for which it is neither necessary nor desirable to lay down a series of propositions covering a variety of different hypothetical situations, which are likely some time later to be found different hypothetical situations, which are likely some time later to be found non-exhaustive. Three questions emerge. The first is whether confidential information is held which if disclosed is likely to affect the concerned (former) client's interests adversely. The second is whether in the particular factual circumstances, viewed objectively there is a real or appreciable risk that the confidential information will be disclosed. The third, which arises if the first two questions are answered affirmatively, is whether recognizing the significance and importance of the special fiduciary relationship which gives rise to the duty of protection the Court's discretionary power to disqualify should be exercised.

H All three questions will frequently overlap. The nature and sensitivity of the information, the extent of the risk, and the adverse effect of possible disclosure are likely to affect all three inquiries. In making a final determination as to whether enjoinder in the nature of disqualification is appropriate, the court will also need to take into account the competing factors of a person's right to the services of a solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally. Mobility within the profession, as it is sometimes termed, is relevant. Access to specialist services and market competition are also matters relevant to the public interest. A balancing exer-

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cise of this kind, which is mindful of the interests of all directly concerned, but does not undermine the integrity of the fiduciary relationship, is more likely to meet the overall ends of justice than rigid rules imposed by the court.

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We would therefore reject the notion of an irrebuttable presumption, and also that of a rebuttable presumption. The preferable approach is the common sense practical one of assessing the evidence. The circumstances will dictate whether there is an unacceptable risk of disclosure of information. *Where there is possession of relevant information, in the absence of negating evidence of protection the Court will readily infer there is a risk of disclosure.* (Emphasis added.)

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In the present case, Mr Sri Dev Nair has produced no evidence to rebut the inference that there will be disclosure. In fact, it is difficult to conclude otherwise, since he acts personally for both the plaintiffs and the third party.

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The Canadian position

In the case of *Suchy v Zurich Insurance Co* 1998 ACWSJ 662632, the British Columbia Court of Appeal held that where a lawyer seeks to act against his former client, the disqualification is automatic. The court went on to state *inter alia* as follows at pp 13–14:

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In many ways, this is the plainest kind of case there could be. It is a case of an individual lawyer who, having acted for the defendants, now proposes to act for the plaintiffs. We have not been referred to any other case where the pattern is as clear as that.

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Again, in my view in the context of the present case Mr Sri Dev Nair's conflict is even more apparent as he seeks to act for both the plaintiffs and the third party in related cases and at the same time.

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In the case of *Carlingwood Motors Ltd v Nissan Canada Inc* [2001] ACWSJ 676321, the issue arose as to whether solicitors for the plaintiff could continue to act for the plaintiff when the defendant was also a client of the said solicitors. It is pertinent to note that in this case there was no actual evidence that confidential information would pass. The Ontario Superior Court applied the principles of the *Prince Jefri Bolkiah*, and held that given the nature of the relationship between the solicitors and the defendant (Nissan), there was a fiduciary relationship between the solicitor and the defendant which would give rise to a conflict if the said solicitors were to now act for the plaintiff. The court further went on to state as follows at p 19:

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As has been noted, this court's jurisdiction to remove lawyers from the record is not to be found in a code of conduct but in the fact that lawyers are officers of the court and their conduct on legal proceedings which may affect the administration of justice is subject to the court's supervisory jurisdiction.

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In the case of *Martin v Gray* 77 DLR (4th) 249, the appellant was represented by a solicitor who was later appointed to the bench. That solicitor was assisted by a graduate articled student. Two years later, the

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A said articulated student joined the firm representing the respondent. Despite the fact that there was no breach of confidence of the articulated student, it was still held that there was conflict. Sopinka J reading out the judgment of the Supreme Court of Canada stated that at p 38:

B I conclude, as well, that to permit the plaintiff's law firm to continue to act in this case would be perceived by the public as placing the defendant in an unfair position when this action goes to trial. The *sine qua non* of the justice system is that there be an unqualified perception of its fairness in the eyes of the general public. In order to sustain that salutary precept, it is essential that the integrity and absolute independence of the courts and its [sic] officers be maintained in such a way as to assure a discerning public that the principle of equality before the law is not in danger of being comprised [sic]. The door must remain firmly shut against any possibility of comprising [sic] that principal [sic]. To allow the plaintiff's law firm to continue to act in this case would open that door, albeit ever so slightly, to the possibility of compromising the impartial administration of justice — something which a court is duty bound to prevent.

D Justice Sopinka went on to state at p 43:

E Nevertheless it is evident from this review of authorities that the clear trend is in favour of a stricter test. This trend is the product of a strong policy in favour of ensuring not only that there be no actual conflict but that there be no appearance of conflict.

F As previously noted in the present case, there is not just a mere appearance of conflict but an actual conflict as Mr Sri Dev Nair acts for both the plaintiff's and the third party.

The statutory position in Malaysia

G Rule 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the said Rules') prohibits an advocate and solicitor from accepting a brief if it would be difficult for him to maintain his professional independence. Rule 5(b)(i) of the said Rules states that:

H A advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

I It is my view that there would be no prejudice to the third party in the event Mr Sri Dev Nair and his firm are disqualified from representing her as she would be at liberty to retain other solicitors. Conversely, to allow Mr Sri Dev Nair to continue to act for the third party would raise serious questions relating to a breach of confidence, conflict of interest and ultimately the due administration of justice.

For the above stated reasons, it is my finding that Mr Sri Dev Nair is in fact in a position of conflict. In the premise, I hereby allowed the defendants' application with costs. **A**

Defendants' application allowed with costs.

Reported by Mariette Peters-Goh **B**

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